

BOARD OF APPEALS CASE NO. 082

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BEFORE THE

APPLICANT: Charles Anderson

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ZONING HEARING EXAMINER

REQUEST: Rezone 2.24 acres from R1 to  
B3; 1209 Old Mountain Road, Joppa

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 4/1/98 & 4/8/98

HEARING DATE: May 18, 1998

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Record: 4/3/98 & 4/10/98

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### **ZONING HEARING EXAMINER'S DECISION**

The Applicant, Charles B. Anderson is seeking to rezone his property from R1 to B3. The subject parcel is located at 1209 Old Mountain Road, Joppa, Maryland 21085 and is more particularly identified on Tax Map 65, Grid 2B, Parcel 123. The parcel consists of 2.24 acres, is presently zoned R1 and is located entirely within the First Election District.

Mr. Charles Anderson appeared before the Hearing Examiner and testified that he was the Applicant and the owner of the subject parcel. The witness stated that the subject parcel is located between Old Mountain Road South and new Maryland Route 152, approximately 1/2 mile from the Interstate 95 interchange at Route 152. The property is 1/3 of a mile from U.S. Route 40 and is improved with house, garage and two outbuildings. The parcel is a corner lot with frontage on Route 152, Old Mountain Road South and a short connector road.

The witness indicated that part of his employment involve noise level readings on properties in the vicinity of BWI airport which he evaluates as part of the State's property acquisition program near BWI. He took noise level readings on his property and found that average traffic noise registered 70-80 decibels with trucks and motorcycles exceeding 130 decibels. He also stated that aside from the noise of traffic associated with Route 152, there is substantial noise from the Maryland Redimix plant, immediately west of his property and from the Coale Trucking Company whose trucks utilize Old Mountain Road South to detour around the Route 152 and Route 7 intersection. The witness went on to state that if this property were located near BWI it would qualify for state acquisition as a result of the noise which, in his opinion, makes the property unsuitable for residential purposes.

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Mr. Anderson described the neighborhood as being bordered by Route 7 to the north, Route 40 to the south, Old Mountain Road to the west and Clayton Road to the east including I-95. The witness testified that there have been a number of changes in the neighborhood. Route 152 has been widened and is now a dual lane highway. A new bridge was constructed over the CSX railroad on Route 152 and a new High's store has opened in the neighborhood. The intersection of Route 152 and Route 40 has been completely rebuilt and a new nursery business opened. The property next to his (the Palmeri property) has been rezoned to B3 and has received approval for a used car lot at that location. Additionally there have been numerous rezonings on Route 152 around the Route 7 and Route 152 intersection and the Route 7 and Old Mountain Road intersection.

On cross examination, Mr. Anderson admitted that his property had been an issue during the 1997 comprehensive zoning review and that the County Council had denied his request to rezone the parcel to B3 as part of that process.

Mr. Denis Canavan appeared next and qualified as an expert land use planner. Mr. Canavan defined the neighborhood as bordered by I-95 north, Winters Run east, Route 40 south and Old Mountain Road to the west. He stated that B3 zoning was consistent with the master land use plan as the parcel is designated Industrial/Employment. By using the 1989 zoning map, the witness described the numerous rezoning that have occurred in the neighborhood. In summary there have been 6 rezonings from R1 to B3 in the neighborhood and one from B1 to B3. Some of the properties rezoned have frontage on Route 152 and some confront or adjoin the subject parcel. Additionally, the witness described other changes that have occurred in the neighborhood since 1989 which include:

1. Installation of overhead transmission lines by BG&E, which resulted in removal of tree buffer.
2. Widening of Route 152 and construction of new bridge over CSX railroad.
3. Construction of High's store at Route 7 and Route 152.
4. Construction of B&O tower.
5. Increased use of the nearby concrete plant, increased traffic on Route 152 and increased rail traffic on CSX track.

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**6. Seven rezonings in the immediate neighborhood, all to B3.**

According to the witness, these changes have caused a substantial change to the character of the neighborhood. The witness also described the development process as one requiring time between the rezoning of a parcel and the actual change in use. He believes the changes occurring in the subject neighborhood are similar to those occurring between Route 24 and Old Emmorton Road. Mr. Canavan disagrees with the conclusions reached by the Department of Planning and Zoning although he did agree that coordinated redevelopment could be beneficial but pointed out that all of the rezoning requests granted in the subject neighborhood thus far have been attained through the piecemeal rezoning process. Mr. Canavan believes that the B3 zone is appropriate for the parcel, the neighborhood and the Master Plan and would have no detrimental impact to adjoining properties.

Next to testify was Deborah Laubech who resides at 1204 Old Mountain Road South which is across from the Palmeri property (a B3 zoned parcel) and adjacent to the subject property. Ms. Laubech stated that there have been numerous changes in the neighborhood, most notably the widening and increased traffic on Route 152 and Old Mountain Road South and the new communications tower. She supported the rezoning request of the Applicant.

Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning appeared next. Mr. McClune told the examiner that the Department opposed the request to rezone the property. The witness indicated that the subject parcel was the subject of review during the 1997 comprehensive rezoning review and that the Department had recommended that the parcel retain its R1 designation. McClune said that even though the property was designated Industrial/Commercial in 1988, it is currently designated Industrial/Employment which, in his opinion, is to promote high end employment opportunities. He stated that this neighborhood was one that required coordinated re-development and that rezoning this parcel on a piecemeal basis to B3 would promote further strip center construction and defeat the purpose of the Industrial/Employment designation. Mr. McClune admitted that there had been changes in the neighborhood and that the 1989 County Council could not have known or even envisioned the number or scope of changes that have occurred in the vicinity of the subject property.

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Mr. McClune could not say which zoning classification would ultimately be appropriate for the property and the area reiterating that those considerations were best made after extensive study of the area, surrounding uses and the needs of the county, what, in short, he describes as "coordinated re-development".

The Staff Report further described the immediate neighborhood and indicated that there have been seven rezonings in the immediate neighborhood but that only one of these properties has actually been developed in accordance with B3 zoning. The Patel property was the first of these and it was rezoned to B3 because of the widening of the CSX railroad use next to his property as well as the removal of tree buffer resulting from installation of BG&E overhead transmission lines. The Staff Report indicates that five of the other rezonings resulted from the designation of the Patel property as B3.

Ms. Judy Rose, who resides at 1205 Old Mountain Road South , approximately 100-150 feet from the Anderson property appeared in opposition to the request. She testified that this is a residential neighborhood and does not want to see it destroyed by commercial development. She indicated that her neighbors like to walk through the area and that children frequently are seen at play. She admits that the proximity to Route 152 has created additional noise, traffic and trash but did not feel that justified creating a commercial strip in her neighborhood. Ms. Rose indicated that she would look more favorably upon a coordinated review of the neighborhood then a piecemeal approach.

Mr. Howard Gross who resides at 1211 Old Mountain Road South also appeared in opposition to the request as did Ms. Carole Leach who resides at 1208 Old Mountain Road South and Ms. Dorothy Pierce who resides at 1210 Old Mountain Road South. These witnesses each expressed their concern that the residential character of the neighborhood would be destroyed by piecemeal rezoning. Ms. Leach stated that she does not want to live across from a business. Mr. Gross stated he had lived next to the Anderson property for 49 years and that the neighborhood is a neatly tended residential area.

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Mr. Michael Rose, residing at 1215 Old Mountain Road South, also appeared in opposition to the request for rezoning. Mr. Rose reiterated much of the earlier opposition testimony and added that the properties that have been rezoned to B3 that are located on the north side of Route 152 have not been developed yet. Even when they are, they will lie very low from the Route 152 roadbed and will probably not be readily visible from the other side of Route 152 where his property and the subject property are located. He stated that the properties on the north side of Route 152 are very different from those on his side which are primarily residential. He further stated that Route 152 acts as a natural barrier between the two types of zoning, residential and commercial.

### **CONCLUSION:**

#### **I. Motion to Dismiss**

As a preliminary matter, People's Counsel argues that the subject Application is premature and should be dismissed. The basis of the motion to dismiss is Section 267-13(E)(3) of the Harford County Code which provides:

“No zoning reclassification of property shall, for a period of one year after the adoption, by Bill, of the Comprehensive Zoning Maps applicable thereof, be granted by the County Council, sitting as the Board of Appeals, on the ground that the character of the neighborhood has changed.”

In January, 1996, the Harford County Council voted to commence Comprehensive Rezoning Review pursuant to Code Section 267-13 et seq. and Article VII, Section 701 of the Harford County Charter. Thereafter, the Department of Planning and Zoning accepted applications for comprehensive rezoning from July, 1996 through October 15, 1996. During November and December, 1996 the Department. As required by Code Sec. 267-13(B)(1), reviewed each application and solicited comments upon each application from other county departments and planning councils. In February, 1997, the Department of Planning and Zoning prepared its proposed revisions and recommendations to the Council.

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These recommendations were the subject of public meetings and further review during the Spring of 1997. In May, 1997, the Department submitted its final recommendations to the Planning Advisory Board (PAB). After review by PAB, the County Executive submitted the proposed revisions and amendments to the Zoning Maps to the County Council who then entered into "the period of Council Review" as required by Code Section 267-13(D). In August, 1997 Council Bill 97-55 was introduced which proposed changes to the County Zoning Maps. On October 1, 1997 the Council passed Bill 97-55 thereby adopting the recommended changes and amendments to the zoning maps.

In November, 1997, 5,400 Harford County citizens took legislative action to Petition Bill 97-55 to referendum, thereby delaying adoption (or defeat) of the Bill and the changes to the zoning maps that it contemplates until November, 1998. Therefore, the Bill contemplated by Section 267-13 has not been "adopted" and cannot be used as the basis for barring requests for rezoning.

Moreover, the Applicant also makes an argument for "mistake" which is not similarly barred by any provision of the Harford County Code. On that basis alone, the request may be heard.

## **II. The Rezoning Request**

Having determined that the Application is properly before the Examiner, it must now be determined if the Applicant has met its burden of proof such that it is entitled to have the subject property rezoned.

In Maryland, a parcel of land may not be rezoned simply because the property owner wants the property rezoned or even if the zoning authority feels the property should be rezoned. Before a property can be rezoned there must be strong evidence of mistake in the zoning classification or a change in the character of the neighborhood since the last comprehensive rezoning. These principles and their corollaries were summarized by the Maryland Court of Appeals in Boyce v. Sembly, 25 Md. 43, 344 A.2d 137 (1975). The Court set forth the change-mistake rule which may be summarized as follows:

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1. The zoning classification assigned to a parcel of land is presumed to be correct.
2. A piecemeal zoning classification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.
3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning or there has been a change in the character of the neighborhood of the subject property since the last comprehensive zoning which justifies the piecemeal zoning classification.
4. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.
5. However, once an applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972). In the case of a denial where the applicant has met his burden of establishing a change in the character of the neighborhood or a mistake in the comprehensive zoning, the zoning authority must find facts, upon the evidence, which would support a denial. Messenger v. Board of County Commissioners for Prince George's County, 259 Md. 693, 271 A.2d 166 (1970), The factual determination of the zoning authority must be supported by substantial, competent and material evidence contained in the record. Not every potential problem will serve to validate a decision to deny a requested rezoning; the problems must be real and immediate, not future and imaginary. Furnace Branch Land Company v. Board of County Commissioners, 232 Md. 536, 194 A.2d 640 (1963).

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As stated by the Maryland Court of Special Appeals, the presumption of the validity of comprehensive rezoning,

“...is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of comprehensive rezoning were invalid. Error can be established by showing that at the time of comprehensive rezoning the Council failed to take into account then existing facts or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council’s action was premised initially on a misapprehension. Error or mistake may also be established by showing that events occurring subsequent to rezoning have proven that the Council’s initial premises were incorrect...It is necessary not only to show facts that exist at the time of comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council...Thus, unless there is appropriate evidence to show that there were then existing facts which the Council, in fact, failed to take into account or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive rezoning is not overcome, and the question of error is not “fairly debatable”. Joyce v. Smelly, supra; Rockville v. Stone, 27 Md. 655, 319 A.2d 536 (1974) (emphasis added).

Thus the Maryland Courts have laid out a two-pronged test. First, has a change in the character of the neighborhood or a mistake been established that would permit the rezoning of the property. Second is whether the property should be rezoned.

One of the primary considerations in a rezoning case is that of defining the neighborhood since that is fundamental in determining whether a “change in the character of the neighborhood” has occurred which is sufficient to warrant a rezoning. What constitutes a neighborhood for the purpose of determining change under the law of rezoning, is not, and should not be precisely and rigidly defined. It may vary from case to case. Woodlawn Area Citizen Association v. Board of County Commissioners of Prince George’s County, 241 Md. 187 (1966). The neighborhood must be shown to comprise the area reasonably within its immediate vicinity and not some area miles away. The changes that must occur in that immediate neighborhood must be of such a nature as to have affected its character. Clayman v. Prince George’s County, 266 Md. 409 (1972). In this case, the Applicant argues that the neighborhood extends to I-95 to Winters Run on the north, Route 40 to the south and Route 152 to the east.

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This is a large area and extends the “neighborhood” well beyond the confines of the small residential neighborhood in which the subject property is situated. Based on the maps included with the file and the testimony of the various witnesses, both for and against this request, it appears that the “neighborhood” reasonably within the immediate vicinity of the subject parcel is more accurately defined as being bordered by Route 7 to the north, Route 152 to the east, CSX rail to the south and Paul’s Lane to the west. This is certainly the neighborhood that will be impacted most acutely by the rezoning request herein. This area is essentially a residential neighborhood , free of commercial development. There have been numerous changes in this neighborhood over the years, most notably the widening of Route 152 and the associated increase in traffic and the construction of overhead transmission lines by BG&E with its associated defoliation and removal of tree buffer. Additionally traffic along the CSX rail lines has increased. However, none of these changes have resulted in a “change in the character of the neighborhood” which would warrant rezoning on that basis. The rezonings that have taken place, with one exception, are still rezonings on paper only with no construction yet begun. The mere rezoning of undeveloped property does not in itself result in a change in the character of the neighborhood, Moreover, Route 152 acts as a substantial man made barrier between most of those properties rezoned and the subject parcel and surrounding neighborhood. Despite the changes noted by the Applicant, the Department and the opponents of this application, the immediate neighborhood remains essentially residential with owners actually residing in the neighborhood. With the exception of a widened Route 152 and the addition of a High’s store, this neighborhood looks essentially as it did in 1989 and has not materially changed in character. In the opinion of the Hearing Examiner, the Applicant has failed to meet his burden in establishing that changes have occurred since the last comprehensive rezoning which have resulted in a “change in the character of the neighborhood” which would warrant a rezoning of his property.

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The Applicant also argues that a “mistake” in the legal sense was made in 1989 because the Council at that time, could not have foreseen subsequently occurring events that would have rendered the initial premises upon which the zoning classification was determined to be invalid. There certainly have been subsequently occurring events in this neighborhood which the 1989 Council could not have been specifically aware. Most notably, that Council could not have been aware that seven piecemeal rezonings would occur in the immediate area. They were aware in 1989 that improvements to Route 152 would take place and they were aware of the CSX railroad use. It is unlikely that the 1989 Council was specifically aware of the interchange construction at Route 152 and I-95 but, as stated earlier, that interchange lies outside the impacted neighborhood.

What is certain, however, is that the Council was aware that the subject property was located on a major arterial road and was, in fact, bisected by Route 152. The zoning maps in 1989 designated this area as Industrial/Commercial so it is certain that the Council was aware that this neighborhood would be subject to future commercialization. Knowing that this property would be subject to future commercialization, the Council took no action to rezone the property to a commercial designation in 1989. Similarly, after exhaustive review during the 1997 Comprehensive Zoning Review, the Council, now aware of all of the changes that have taken place in the neighborhood and surrounding vicinity, elected not to alter the R1 zoning designation.

Even if the subsequently occurring events could be characterized as “mistakes”, that does not necessarily mean that B3 is the appropriate zoning classification for this property. The Department of Planning and Zoning has determined that the entire area should be subjected to coordinated re-development and cannot, without that assessment, render an opinion on the appropriate zoning classification. The Applicant contends that B3 is appropriate in light of the Master Land Use Plan designation and the existence of other B3 properties in the immediate area. However, the Hearing Examiner concurs with the Department of Planning and Zoning that this is an area that warrants extensive study and what has been characterized as coordinated re-development.

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Perhaps this case best illustrates the value of a comprehensive zoning process wherein extensive resources are brought together to study the overall zoning plan, the needs of the community and the resulting impacts on surrounding properties. While piecemeal rezonings are a legitimate method of obtaining rezoning only "strong evidence of mistake in the original rezoning or comprehensive rezoning" will be sufficient to warrant a piecemeal rezoning. Stratakis v. Beauchamp, 268 Md. 643, 652-53 (1973). In the opinion of the Hearing Examiner, the Applicant has failed to meet his burden of proof in establishing a "mistake" argument.

For all of the reasons discussed herein, the Hearing Examiner recommends that the Applicant's request to rezone his property from R1 to B3 be denied.

Date

July 28, 1998

William F. Casey  
William F. Casey  
Zoning Hearing Examiner